

**2876.5023 PROHIBITED CONDUCT IN PROVIDING INVESTMENT ADVICE.**

Subpart 1. **Fiduciary duty.** A person who is an investment adviser or a federal covered investment adviser is a fiduciary and has a duty to act primarily for the benefit of its clients. This part applies to federal covered investment advisers to the extent permitted by the National Securities Markets Improvement Act of 1996. While the extent and nature of this duty varies according to the nature of the relationship between an investment adviser or a federal covered investment adviser and its clients and the circumstances of each case, an investment adviser or a federal covered investment adviser shall not engage in prohibited fraudulent, deceptive, or manipulative conduct, including the following:

A. recommending to a client to whom investment advisory services are provided the purchase, sale, or exchange of any security without reasonable grounds to believe that the recommendation is suitable for the client on the basis of information furnished by the client after reasonable inquiry concerning the client's investment objectives, financial situation and needs, and any other information known by the investment adviser or federal covered investment adviser;

B. exercising any discretionary authority in placing an order for the purchase or sale of securities for a client without obtaining written discretionary authority from the client within ten business days after the date of the first transaction placed pursuant to oral discretionary authority, unless the discretionary authority relates solely to the price at which, or the time when, an order involving a definite amount of a specified security shall be executed, or both;

C. inducing trading in a client's account that is excessive in size or frequency in view of the financial resources, investment objectives, and character of the account;

D. placing an order to purchase or sell a security for the account of a client without authority to do so;

E. placing an order to purchase or sell a security for the account of a client upon instruction of a third party without first having obtained a written third-party trading authorization from the client;

F. borrowing money or securities from a client unless the client is a broker-dealer, an affiliate of the investment adviser, or a financial institution engaged in the business of loaning funds;

G. loaning money or securities to a client unless the investment adviser is a financial institution engaged in the business of loaning funds or the client is an affiliate of the investment adviser;

H. misrepresenting to any client, or prospective client, the qualifications of the investment adviser, or any employee or person affiliated with the investment adviser, or misrepresenting the nature of the advisory services being offered or fees to be charged for

such service, or to omit to state a material fact necessary to make the statements made regarding qualifications, services, or fees, in light of the circumstances under which they are made, not misleading;

I. providing a report or recommendation to any client prepared by someone other than the investment adviser without disclosing that fact. This prohibition does not apply to a situation where the investment adviser uses published research reports or statistical analyses to render advice or where an investment adviser orders such a report in the normal course of providing service;

J. charging a client an unreasonable fee;

K. failing to disclose to clients in writing before any advice is rendered any material conflict of interest relating to the investment adviser, or any of its employees, or affiliated persons which could reasonably be expected to impair the rendering of unbiased and objective advice including:

(1) compensation arrangements connected with investment advisory services to clients which are in addition to compensation from such clients for such services; and

(2) charging a client an investment advisory fee for rendering investment advice when compensation for effecting securities transactions pursuant to such advice will be received by the investment adviser or its employees or affiliated persons;

L. while acting as principal for its own advisory account, to knowingly sell any security to or purchase any security from a client, or while acting as broker-dealer for a person other than the client, to knowingly effect any sale or purchase of any security for the account of the client, without disclosing to the client in writing before the completion of the transaction the capacity in which it is acting and obtaining the consent of the client to the transaction:

(1) the prohibitions of this item shall not apply to any transaction with a customer of a broker-dealer if the broker-dealer is not acting as an investment adviser in relation to the transaction;

(2) the prohibitions of this item shall not apply to any transaction with a customer of a broker-dealer if the broker-dealer acts as an investment adviser solely:

(a) by means of publicly distributed written materials or publicly made oral statements;

(b) by means of written materials or oral statements not purporting to meet the objectives or needs of specific individuals or accounts;

(c) through the issuance of statistical information containing no expressions of opinion as to the investment merits of a particular security; or

(d) any combination of the foregoing services;

(3) publicly distributed written materials or publicly made oral statements shall disclose that, if the purchaser of the advisory communication uses the investment adviser's services in connection with the sale or purchase of a security which is a subject of the communication, the investment adviser may act as principal for its own account or as agent for another person. Compliance by the investment adviser with the foregoing disclosure requirement shall not relieve it of any other disclosure obligations under the Minnesota Securities Act;

(4) definitions for purposes of this item:

(a) "publicly distributed written materials" means written materials which are distributed to 35 or more persons who pay for those materials;

(b) "publicly made oral statements" means oral statements made simultaneously to 35 or more persons who pay for access to those statements;

M. guaranteeing a client that a specific result will be achieved with advice rendered;

N. publishing, circulating, or distributing any advertisement which does not comply with Rule 206(4)-1 under the Investment Advisers Act of 1940;

O. making, in the solicitation of clients, any untrue statement of a material fact, or omitting to state a material fact necessary in order to make the statement made, in light of the circumstances under which they are made, not misleading;

P. failing to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material nonpublic information contrary to the provisions of Section 204A of the Investment Advisers Act of 1940;

Q. disclosing the identity, investments, or other financial information of any client or former client unless required by law to do so, or unless consented to by the client;

R. taking any action, directly or indirectly, with respect to those securities or funds in which any client has any beneficial interest, where the investment adviser has custody or possession of the securities or funds when the action of the investment adviser is subject to and does not comply with part 2876.4116;

S. engaging in any act, practice, or course of business which is fraudulent, deceptive, manipulative, or unethical; or

T. engaging in conduct or any act, indirectly or through or by any other person, which would be unlawful for such person to do directly under the provisions of the Minnesota Securities Act, Minnesota Statutes, chapter 80A, or any rule or order thereunder.

Subp. 2. **Agency cross transactions.** The prohibitions of subpart 1 shall not apply to an investment adviser effecting an agency cross transaction for an advisory client provided the following conditions are met:

A. the advisory client executes a written consent prospectively authorizing the investment adviser to effect agency cross transactions for such client;

B. before obtaining written consent from the client, the investment adviser makes full written disclosure to the client that, with respect to agency cross transactions, the investment adviser will act as broker-dealer for, receive commissions from, and have a potentially conflicting division of loyalties and responsibilities regarding both parties to the transactions;

C. at or before the completion of each agency cross transaction, the investment adviser or any other person relying on this subpart sends the client a written confirmation. The written confirmation shall include:

(1) a statement of the nature of the transaction;

(2) the date the transaction took place;

(3) an offer to furnish, upon request, the time when the transaction took place;

and

(4) the source and amount of any other remuneration the investment adviser received or will receive in connection with the transaction. In the case of a purchase, if the investment adviser was not participating in a distribution, or, in the case of a sale, if the investment adviser was not participating in a tender offer, the written confirmation may state whether the investment adviser has been receiving or will receive any other remuneration and that the investment adviser will furnish the source and amount of such remuneration to the client upon the client's written request;

D. at least annually, and with or as part of any written statement or summary of the account from the investment adviser, the investment adviser or any other person relying on this subpart sends each client a written disclosure statement identifying:

(1) the total number of agency cross transactions during the period for the client since the date of the last such statement or summary; and

(2) the total amount of all commissions or other remuneration the investment adviser received or will receive in connection with agency cross transactions for the client during the period;

E. each written disclosure and confirmation required by this subpart must include a conspicuous statement that the client may revoke the written consent required under item A at any time by providing written notice to the investment adviser;

F. no agency cross transaction may be affected in which the same investment adviser recommended the transaction to both any seller and any purchaser;

G. for purposes of this subpart, "agency cross transaction for an advisory client" means a transaction in which a person acts as an investment adviser in relation to a transaction in which the investment adviser, or any person controlling, controlled by, or under common control with such investment adviser, acts as a broker-dealer for both the advisory client and another person on the other side of the transaction. When acting in such capacity the person is required to be registered as a broker-dealer in this state unless excluded from the definition; and

H. nothing in this subpart shall be construed to relieve an investment adviser from acting in the best interests of the client, including fulfilling a duty with respect to the best price and execution for the particular transaction for the client nor shall it relieve any investment adviser of any other disclosure obligations imposed by the Minnesota Securities Act, Minnesota Statutes, chapter 80A.

**Statutory Authority:** *MS s 45.023; 80A.82*

**History:** *34 SR 593*

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